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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 CAMERON H.,

8 Plaintiff,

9 v.

10 COMMISSIONER OF SOCIAL SECURITY,

11 Defendant.

CASE NO. C19-5303 BAT

12  
13 **ORDER AFFIRMING THE**  
14 **COMMISSIONER'S FINAL DECISION**  
15 **AND DISMISSING THE CASE WITH**  
16 **PREJUDICE**

17 Plaintiff appeals the denial of his application for Disability Insurance Benefits for the  
18 period of July 14, 2007 through August 31, 2013. He contends the ALJ erred by discounting  
19 plaintiff's testimony, misevaluating the medical opinion evidence, and misevaluating lay witness  
20 testimony for the closed period. Dkt. 13. As a result, he further argues the ALJ's residual  
21 functional capacity ("RFC") determination and step-five findings were erroneous. *Id.* The Court  
22 **AFFIRMS** the Commissioner's final decision and **DISMISSES** the case with prejudice.

23 **BACKGROUND**

This is the fourth time this matter comes before the Court for judicial review of an  
administrative decision. *See Hartwell v. Colvin*, No. C16-5650-BAT (W.D. Wash. Apr. 4, 2017);  
*Hartwell v. Colvin*, No. C13-6004-BJR-KLS (W.D. Wash. Oct. 3, 2014) *adopted by Hartwell v.*  
*Colvin*, No. C13-6004-BJR, 2014 WL 6071422 (W.D. Wash. Nov. 13, 2014); *Hartwell v. Astrue*,

1 No. C10-5660-RAJ-JPD (W.D. Wash. June 21, 2011) *adopted by* C10-5660-RAJ (W.D. Wash.  
2 July 14, 2011). In 2017, the Court reversed the third ALJ decision and provided detailed  
3 instructions about the scope of remand:

4           On remand, the ALJ should shall reevaluate Dr. Peterson's and Mr.  
5           Zerger's 2006 and 2007 assessments; Dr. Packer's July 8, 2007  
6           opinion; Dr. Thomas's March 24, 2009 opinion that Mr. Hartwell  
7           is limited to sedentary work; Ms. Miller's October 25, 2007 and  
8           April 16, 2008 opinions that Mr. Hartwell is limited to sedentary  
9           work; Ms. Biggerstaff's April 2010 opinion that [plaintiff] is  
10          limited to sedentary work; and Ms. Atkins-Hartwell's testimony  
11          that [plaintiff] had difficulty standing and sitting, needed to lie  
12          down to relieve pain, and he could not stretch. These reevaluations  
13          must take into consideration the fact that evidence pre-dating the  
14          alleged onset date is generally of limited relevance. After  
15          reevaluating the medical opinion evidence, the ALJ shall, as  
16          necessary, also reevaluate [plaintiff's] RFC and the remaining  
17          steps of the five-step evaluation process.

18 Tr. 1836–37. The Court affirmed the ALJ's evaluation of the other medical evidence and of  
19 plaintiff's testimony. *See* Tr. 1809–37. The ALJ conducted a fourth hearing and, once again,  
20 found plaintiff not disabled for the relevant period in a December 2018 decision. Tr. 1662–84;  
21 1730–74. This appeal followed.

22           Because plaintiff was previously found to be disabled as of September 1, 2013, the ALJ's  
23 decision concerned the relevant period of July 14, 2007 to August 31, 2013. Tr. 1662. Utilizing  
the five-step disability evaluation process, the ALJ found that plaintiff met the insured status  
requirements through December 31, 2011; he had not engaged in substantial gainful activity  
since the amended alleged onset date of July 14, 2007; and that he had the severe impairments of  
degenerative disc disease, epicondylitis of the right elbow, and left shoulder impingement. Tr.  
1665. The ALJ found that plaintiff had the RFC to perform light work, except he could never  
climb ladders, ropes, or scaffolds; he could occasionally climb ramps and stairs; he could  
occasionally stoop, kneel, crouch, and crawl; he could perform no overhead reaching with the

1 left, non-dominant upper extremity; he could perform no more than frequent rotation, extension,  
2 and flexion of the neck; and he required a sit/stand alternative, defined as the ability to change  
3 position after 30 to 60 minutes, for 3 to 5 minutes, while remaining on task. Tr. 1669. At step  
4 four, the ALJ found that plaintiff could not perform his past relevant work as a door maker and a  
5 sales attendant for building materials. Tr. 1682. At step five, the ALJ found that jobs existed in  
6 significant numbers in the national economy that plaintiff could perform. Tr. 1682–83. The ALJ  
7 therefore found plaintiff not disabled during the period at issue from July 14, 2007 through  
8 August 31, 2013. Tr. 1683–84.

### 9 DISCUSSION

10 The Court previously determined that the ALJ committed no harmful error by  
11 discounting plaintiff’s testimony and by giving little weight to the March 2007 opinion of Bud  
12 Zunino, A.R.N.P., to the November 2009 opinion of Gregory Dorris, Psy. D., and to the March  
13 2011 and December 2012 opinions of Mary Ellen Biggerstaff, A.R.N.P. Tr. 1812–33. Under the  
14 law of the case doctrine, the decision of an appellate court on a legal issue must be followed in  
15 all subsequent proceedings in the same case. *See, e.g., United States v. Lewis*, 611 F.3d 1172,  
16 1179 (9th Cir. 2010). Because plaintiff has offered no reason to upset the Court’s decision or the  
17 ALJ’s on remand, the Court rejects plaintiff’s challenge to the ALJ’s evaluation of plaintiff’s  
18 testimony, and to the March 2007 opinion of Mr. Zunino, to the November 2009 opinion of Dr.  
19 Dorris, and to the March 2011 and December 2012 opinions of Ms. Biggerstaff. *See* Dkt. 13, at  
20 3–4, 9–15. Moreover, plaintiff’s counsel has pasted into his current brief the same argument  
21 made in the earlier appeal regarding the May 2010 opinion of Stephen W. Snow, M.D. *Compare*  
22 Dkt. 13, at 9, *with Hartwell v. Colvin*, No. C16-5650-BAT, Dkt. 18, at 9–10. As before, counsel  
23 did not indicate how the ALJ erred; rather, he summarized Dr. Snow’s findings before asserting

1 that the evidence supported plaintiff's left-arm limitations. *Id.* And, as before, the Court finds  
2 that any argument concerning the ALJ's treatment of Dr. Snow's opinion has been waived as  
3 unsupported. *See* Tr. 1825; *Avila v. Astrue*, No. C07-1331, 2008 WL 4104300 (E.D. Cal. Sept. 2,  
4 2008) at \*2 (unpublished opinion) (*citing Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841  
5 F.2d 918, 923-24 (9th Cir. 1996) (party who presents no explanation in support of claim of error  
6 waives issue)). Plaintiff has not substantively challenged the reevaluation of the pre-alleged  
7 onset date opinions of William Peterson, M.D., Brian Zerger, PA-C, and Brent Packer, M.D. *See*  
8 Dkt. 13; Dkt. 15; Tr. 1836. The Court therefore finds that plaintiff has waived any challenges to  
9 the ALJ's treatment of the opinions of Dr. Peterson, Mr. Zerger, and Dr. Packer.

10 The issues within the scope of remand that plaintiff challenges concern the ALJ's  
11 reevaluation of medical evidence and lay testimony. Plaintiff challenges the ALJ's reassessment  
12 on remand of: (1) the March 2009 opinion of examining physician Eric Thomas, D.O.;  
13 (2) October 2007 and April 2008 opinions of Judy Miller, A.R.N.P.; (3) the April 2010 opinion  
14 of Mary Ellen Biggerstaff, A.R.N.P.; and (4) the lay testimony by plaintiff's ex-wife Melinda  
15 Atkins-Hartwell. Plaintiff also challenges the ALJ's consequent RFC assessment and step-five  
16 evaluation. The Court finds that plaintiff has failed to demonstrate that the ALJ's interpretation  
17 of the medical or testimonial evidence was unreasonable, unsupported by substantial evidence, or  
18 based on harmful legal error. *See Molina v. Astrue*, 674 F.3d 1104, 1110–11 (9th Cir. 2012);  
19 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). Plaintiff consequently has failed to  
20 demonstrate that the ALJ erroneously assessed RFC or committed step-five error.

21 **1. Eric Thomas, D.O.**

22 The Court directed the ALJ to reevaluate Dr. Thomas's March 24, 2009 examining  
23 opinion that plaintiff was limited to sedentary work because it was harmful error to have

1 discounted Dr. Thomas's opinion on the basis that a sedentary restriction was inconsistent with  
2 plaintiff's ability to move his neck, bend at the waist, and move his upper extremities.<sup>1</sup> Tr. 1822–  
3 25. Plaintiff argues that on remand the ALJ failed to cite specific and legitimate reasons for  
4 rejecting Dr. Thomas's examining opinion that plaintiff was limited to sedentary work. *Lester v.*  
5 *Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995). The Court disagrees.

6 The ALJ gave little weight to Dr. Thomas's conclusion that plaintiff was limited to  
7 sedentary work, Tr. 405–08, because (1) it was inconsistent with Dr. Thomas's concurrent  
8 opinion that plaintiff had moderate limitations; and (2) it was inconsistent with other medical  
9 evidence of full strength and of a normal gait. Tr. 1679 (citing Tr. 373, 388, 391, 427, 671, 674,  
10 734, 736, 738, 740, 1439, 1441). The contradiction between Dr. Thomas's conclusion of a  
11 sedentary restriction and his own observation that plaintiff's limitations were "moderate" in  
12 severity, Tr. 407, as well as the inconsistency between a sedentary restriction and extensive,  
13 unremarkable examination findings regarding strength and gait, both constitute specific and  
14 legitimate reasons to discount Dr. Thomas's March 2009 opinion. *See* 20 C.F.R.  
15 §§ 404.1527(c)(3)–(4); *Valentine v. Commissioner SSA*, 574 F.3d 685, 692–93 (9th Cir. 2009)  
16 (internal inconsistencies); *Morgan v. Commissioner of SSA*, 169 F.3d 595, 601 (9th Cir. 1999)  
17 (inconsistency with the medical record). Plaintiff has presented no evidence or argumentation  
18 that undermines the ALJ's reasonable inferences.

19 The Court finds that the ALJ did not harmfully err as a matter of fact or law in  
20 discounting Dr. Thomas's March 2009 examining opinion.

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23 <sup>11</sup> The Court found that plaintiff had failed to demonstrate harmful error by discounting Dr.  
Thomas's opinion regarding postural limitations because Dr. Thomas had failed to describe the  
severity of those restrictions. Tr. 1824.

1           **2. Judy Miller, A.R.N.P.**

2           The Court directed the ALJ to reevaluate Ms. Miller's October 25, 2007 and April 16,  
3 2008 opinions that plaintiff was limited to sedentary work because it was harmful error to have  
4 concluded that Ms. Miller had relied on plaintiff's subjective statements without regard to  
5 objective medical evidence given Ms. Miller's explicit references to MRI and x-ray scans.<sup>2</sup> Tr.  
6 1829–30. Plaintiff contends that the ALJ failed to give germane reasons for giving little weight  
7 on remand to Ms. Miller's October 2007 and April 2008 opinions. *See Molina v. Astrue*, 674  
8 F.3d 1104, 1111 (9th Cir. 2012). The Court disagrees.

9           The ALJ gave little weight to Ms. Miller's October 2007 and April 2008 opinions for at  
10 least two germane reasons: (1) the sedentary restriction was inconsistent with Ms. Miller's  
11 contemporaneous observations about the severity of plaintiff's limitations; (2) the opined  
12 sedentary restriction was undermined in part by plaintiff's unreliability as an accurate historian  
13 of symptoms and his narcotic-seeking behavior. Tr. 1678. First, the ALJ noted that although in  
14 October 2007 plaintiff had decreased range of motion in the back and neck and some back pain,  
15 he remained ambulatory and in no acute distress. Tr. 1678 (citing Tr. 382). Similarly, the ALJ  
16 observed that although plaintiff had diminished sensation in the digits of the left hand with  
17 slightly diminished sensation in the left forearm, he maintained full strength and normal range of  
18 motion in the upper extremities. Tr. 1678 (citing Tr. 382). Moreover, on physical exam, despite  
19 certain range-of-motion restrictions, plaintiff was able to flex within six inches of the floor,  
20 maintained full strength, was able to reach behind his back without difficulty, and was able to  
21 reach across and touch the opposite shoulder without difficulty; and there were no signs of  
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23           <sup>2</sup> The Court found that the ALJ had not harmfully erred by discounting Ms. Miller's opined  
postural limitations. Tr. 1830.

1 neurological deficits to support left-leg numbness and no electrodiagnostic testing to support his  
2 complaints. Tr. 1678–79 (citing Tr. 371, 373). Second, the ALJ noted that Ms. Miller appeared to  
3 base her April 2008 opinion of a sedentary limitation largely on plaintiff’s self-reports though  
4 plaintiff gave unreliable statements and had shown narcotic-seeking behavior, that plaintiff  
5 admitted to moderate relief of pain from physical therapy, and only five months later Ms. Miller  
6 denied plaintiff Vicodin refills because he had not provided a urine sample for a drug screen. Tr.  
7 1678–79 (citing Tr. 367, 371, 373).

8         On the first point, the ALJ could reasonably discount the severity of plaintiff’s limitations  
9 based on Ms. Miller’s contemporaneous observations of greater strength and mobility than  
10 would be consistent with a sedentary limitation. *See Valentine*, 574 F.3d at 692–93. On the  
11 second point, the Court previously determined that the ALJ had cited clear and convincing  
12 reasons for discounting plaintiff’s symptom testimony, including his minimal treatment over the  
13 relevant period, his drug-seeking and secondary-gain behavior, and lack of corroborating  
14 medical evidence of pain severity. Tr. 1815–18. The ALJ could therefore discount Ms. Miller’s  
15 opinion based in part on plaintiff’s properly discounted symptom testimony. *See Bayliss v.*  
16 *Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005).

17         The Court finds that the ALJ did not harmfully err as a matter of fact or law in  
18 discounting Ms. Miller’s October 2007 and April 2008 opinions.

19         **3. Mary Ellen Biggerstaff, A.R.N.P.**

20         The Court directed the ALJ to reevaluate Ms. Biggerstaff’s April 15, 2010 opinion that  
21 plaintiff was limited to sedentary work because it was harmful error to have concluded that a  
22 sedentary restriction was inconsistent with plaintiff’s ability to move his neck, bend at the waist,  
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1 and move his upper extremities.<sup>3</sup> Tr. 1830–31. Plaintiff argues that on remand the ALJ failed to  
2 cite germane reasons for giving little weight to Ms. Biggerstaff’s April 2010 opinion. The Court  
3 disagrees.

4       The ALJ gave little weight to Ms. Biggerstaff’s April 2010 opinion for three germane  
5 reasons: (1) the sedentary restriction was internally inconsistent with her own examination  
6 observations; (2) it was undermined in-part by plaintiff’s unreliability as an accurate historian  
7 and his narcotic-seeking behavior; and (3) it was inconsistent with medical evidence showing  
8 full strength and normal sensation. Tr. 1679. First, the ALJ acknowledged that Ms. Biggerstaff’s  
9 examination results showed some limits in range of motion of the left shoulder, neck, and back,  
10 some loss of balance when lifting his left lower extremity, and back pain with hip abduction and  
11 lifting the left lower extremity. *Id.* (citing Tr. 653). The ALJ found, however, that those findings  
12 did not appear to be commensurate with Ms. Biggerstaff’s opinion of severe limitations. Tr.  
13 1679. Second, as with regards to Ms. Miller’s opinion, the ALJ found that the severity of the  
14 limitations found by Ms. Biggerstaff appeared to be based heavily on plaintiff’s unreliable  
15 statements about his symptoms. Third, the ALJ found that plaintiff’s statements about pain, as  
16 well as numbness and tingling, were at odds with the medical examinations that showed plaintiff  
17 to have full strength and normal sensation. Tr. 1679 (citing Tr. 373, 427).

18       The Court finds that the ALJ did not harmfully err as a matter of fact or law in  
19 discounting Ms. Biggerstaff’s April 2010 opinion.  
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23 <sup>3</sup> The Court found that the ALJ had not harmfully erred by discounting Ms. Biggerstaff’s opined  
postural limitations. Tr. 1830–31.



1                   **4. Melinda Atkins-Hartwell**

2                   The Court directed the ALJ to reevaluate the lay testimony of plaintiff's ex-wife Ms.  
3 Atkins-Hartwell that plaintiff had difficulty standing and sitting, needed to lie down to relieve  
4 pain, and he could not stretch.<sup>4</sup> Tr. 1835. While acknowledging Ms. Atkins-Hartwell's testimony  
5 by restating it in detail, the ALJ erred and violated the scope of remand by declining to evaluate  
6 these limitations with any specificity. Tr. 1676. Nonetheless, the Court finds the ALJ's clear  
7 error was harmless because to the extent her testimony was accepted the limitations appeared in  
8 the RFC assessment and to the extent it was rejected the limitations were discounted as  
9 contradicted by the medical evidence or for the same reasons as plaintiff's testimony.

10                  The ALJ discounted Ms. Atkins-Hartwell's statements regarding plaintiff's limitations  
11 and abilities as inconsistent with or unsupported by the medical evidence because: (1) although  
12 she indicated she purchased a transport chair for him, the evidence showed that plaintiff  
13 maintained a normal gait; (2) even when plaintiff alleged increased weakness and stumbling, he  
14 maintained a normal gait; (3) there was no medical evidence to support plaintiff having problems  
15 dropping things in light of plaintiff's full strength in his upper extremities; and (4) the degree of  
16 mental restrictions were not consistent with the evidence of declining mental-health treatment,  
17 including medication, and intact mental status exams. Tr. 1676. Although the ALJ's citation to  
18 plaintiff's normal gait and full strength in his upper extremities is related to the Court's directive  
19 to "reevaluate Ms. Atkins-Hartwell's testimony that [plaintiff] had difficulty standing and sitting,  
20 needed to lie down to relieve pain, and he could not stretch," Tr. 1835, this analysis fell short

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22 <sup>4</sup> The ALJ had not specifically addressed Ms. Atkins-Hartwell's testimony that plaintiff had  
23 difficulty standing and sitting and needed to lie down to relieve pain. Tr. 1834. The Court found  
that the ALJ could not reject testimony about plaintiff's inability to stretch solely based on 5/5  
motor strength. Tr. 1835. The Court affirmed the ALJ's reasons for giving only some weight to  
Ms. Atkins-Hartwell's testimony about all other limitations. Tr. 1833–35.

1 with respect to specificity and analysis. In fact, the Court noted that the ALJ had earlier failed to  
2 explain the inconsistency between testimony that plaintiff could not stretch and evidence that he  
3 retained 5/5 motor strength. *Id.* The Court finds, however, that the ALJ's clear error in declining  
4 to follow the scope of remand is rendered harmless by the ALJ's RFC assessment and evaluation  
5 of the medical evidence and plaintiff's testimony.

6 First, with respect to Ms. Atkins-Hartwell's testimony that plaintiff had difficulty  
7 standing and sitting, the ALJ incorporated that limitation in the RFC by requiring "a sit/stand  
8 alternative, defined as the ability to change position after 30 to 60 minutes, for 3 to 5 minutes,  
9 while remaining on task." Tr. 1669. That is, the ALJ accepted Ms. Atkins-Hartwell's statements  
10 about plaintiff's difficulty in standing and sitting to the extent they were consistent with the  
11 accepted portions of plaintiff's testimony. Tr. 1670–71; *see, e.g.*, Tr. 1814 (noting plaintiff's  
12 testimony that he could stand for up to 45 minutes). Second, with respect to Ms. Atkins-  
13 Hartwell's testimony that plaintiff needed to lie down to relieve pain, the Court has earlier  
14 affirmed the rejection of plaintiff's testimony about the severity of his pain due to his minimal  
15 treatment for several years during the relevant period, due to drug-seeking and secondary-gain  
16 behavior, and due to lack of corroborating objective evidence. Tr. 1815–18. Nothing in Ms.  
17 Atkins-Hartwell's statements suggests that her testimony about plaintiff's pain should be given  
18 more weight than plaintiff's properly discounted statements about pain. Third, with respect to  
19 Ms. Hartwell's testimony that plaintiff could not stretch, her testimony is incorporated in the  
20 RFC to the extent it is not contradicted by the medical evidence. Ms. Atkins-Hartwell testified  
21 that plaintiff cannot "even stretch to reach things for me." Tr. 651. In making this broad  
22 statement, Ms. Atkins-Hartwell did not distinguish between reaching with the right or left upper  
23 extremity. The ALJ noted that months prior to the alleged onset date in 2007 plaintiff attended

1 physical therapy for right-elbow epicondylitis and, at that time, there was moderate tenderness  
2 but full range of motion and only a mild reduction in strength. Tr. 1673 (citing Tr. 304, 349–50).  
3 Nonetheless, plaintiff showed no additional treatment or clinical signs of right elbow pain from  
4 that point forward. Tr. 1673. The ALJ therefore did not include any right, upper extremity  
5 limitations in the RFC and plaintiff has not challenged that determination. The RFC did,  
6 however, account for plaintiff’s left-shoulder impingement by limiting him to no overhead  
7 reaching with his left, upper extremity. Tr. 1669. The Court infers that the ALJ reasonably  
8 evaluated the evidence and determined that plaintiff had no severe limitations with respect to his  
9 right, upper extremity but implicitly accounted for Ms. Atkins-Hartwell’s statement that plaintiff  
10 could not “stretch to reach things” by including in the RFC a complete restriction on reaching  
11 overhead with his left, upper extremity.

12 The Court finds that the ALJ committed clear error by declining to reevaluate Ms.  
13 Atkins-Hartwell’s testimony that plaintiff had difficulty standing and sitting, needed to lie down  
14 to relieve pain, and he could not stretch. This error was, however, harmless. The Court therefore  
15 affirms the ALJ’s decision to discount Ms. Atkins-Hartwell’s testimony.

## 16 **5. Residual Functional Capacity and Step-Five Evaluation**

17 Because the Court finds that the ALJ’s reevaluation of the medical and lay testimony was  
18 supported by substantial evidence and was free from harmful error, the Court rejects plaintiff’s  
19 argument that the RFC assessment based on those determinations was erroneous and the step-  
20 five evaluation was flawed. *See Bayliss*, 427 F.3d at 1217–18 (holding that an ALJ may rely on  
21 vocational expert testimony when the vocational hypothetical contains all of the limitations  
22 found to be credible and supported).

1 **CONCLUSION**

2 For the foregoing reasons, the Commissioner's decision is **AFFIRMED** and this case is  
3 **DISMISSED** with prejudice.

4 DATED this 31st day of January, 2020.

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7 BRIAN A. TSUCHIDA  
8 Chief United States Magistrate Judge  
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